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No. 84-520

In the Supreme Court of the United States

OCTOBER TERM, 1984

E.A. GREGORY AND VONNA JO GREGORY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the government, both before the grand jury and at trial, utilized evidence tainted by their prior immunized testimony in a bankruptcy proceeding.

1. Following a jury trial in the United States District Court for the Southern District of Alabama, petitioners were convicted on one count of conspiracy to misapply bank funds, make false statements, and commit wire fraud, in violation of 18 U.S.C. 371, and on eight counts of misapplication of bank funds, in violation of 18 U.S.C. 656.[1] Petitioner E.A. Gregory was sentenced to concurrent two-year terms of imprisonment on each count. His wife, petitioner Vonna Jo Gregory, was sentenced to concurrent

[1]Two co-defendants, G.W. Atkinson and Robert Spurlock, were convicted on the conspiracy count. Atkinson was also convicted on six of the substantive counts. Spurlock's certiorari petition, which raises an issue unrelated to the instant petition, is pending before the Court in No. 84-542.

three-year terms of probation on each count. The court of appeals affirmed in part but remanded for a further evidentiary hearing to establish whether the government's proof had been derived entirely from sources independent of petitioners' immunized testimony. Pet. App. 1B-67B; 730 F.2d 692.

The pertinent facts are set out in the opinion of the court of appeals (Pet. App. 17B-22B). Briefly stated, in November 1975 petitioners purchased a controlling interest in the Bank of Camden (Alabama), which was renamed the Wilcox County Bank. Both petitioners were on the board of directors, and petitioner E.A. Gregory was chairman of the board. While they controlled the bank, petitioners, aided by their co-conspirators, engaged in various forms of self-dealing at the bank's expense. The substantive counts against petitioners related to a series of loans made by the bank to corporations owned by petitioners in the month following petitioners' sale of their bank stock. The loans totalled $864,000 and were made in April and May 1977.

Petitioners and their corporation sought relief from their creditors under the Bankruptcy Act. Five weeks later, petitioners met with their creditors. Pursuant to 11 U.S.C. 344, they requested and were granted immunity under 18 U.S.C. 6002 covering their testimony in the bankruptcy proceedings. At the time of the bankruptcy proceedings, the FBI and the Federal Deposit Insurance Corporation (FDIC) were investigating petitioners for possible criminal violations. FDIC personnel, along with representatives of some 23 creditors, attended the meetings at which petitioners gave their immunized testimony.

Prior to their criminal trial, petitioners moved to dismiss the indictment on the ground that it was tainted by the prior immunized testimony. The district court required petitioners to cite specific immunized testimony and to state how

that testimony affected the government's case. As to each item cited by petitioners, the government demonstrated that it had an independent source for its proof. The district court then denied the motion to dismiss. See Pet. App. 1A-3A.

2. On appeal from petitioners' convictions, the court of appeals affirmed in part but remanded the case for a further hearing on the issue of whether the immunized testimony had tainted the proceedings. The court of appeals found that the district court had erred in placing on petitioners the burden of going forward to challenge specific items of the government's proof (Pet. App. 20B-29B). Rather, the court concluded, it was the government's burden to " 'show how it acquired all of the evidence admitted below.' " *Id.* at 28B, quoting *United States* v. *Seiffert*, 463 F.2d 1089, 1092 (5th Cir. 1972). The district court was directed to dismiss the indictment unless the government could establish an independent source for all of the evidence presented to the grand jury. A new trial was to be ordered if the government was unable to establish an independent source for all of its trial proof. Pet. App. 28B-29B. The court of appeals upheld the district court's finding that an independent source had been established for the items originally proffered by petitioners at the district court's direction. *Id.* at 24B & n.2.

3. Petitioners seek review on three grounds relating to the district court's rulings on whether their immunized testimony tainted the proceedings. First, they allege that the district court, in finding that there was no taint with respect to the evidence considered by the grand jury, improperly speculated that independent sources would have led the government to that proof (Pet. 21-24). Second, petitioners argue that the district court misstated the law in ruling that the prosecution may have access to and may have studied immunized testimony without necessarily having used that testimony (Pet. 24-28). Third, they contend that the

government's investigation following the bankruptcy proceedings must have drawn upon various aspects of the immunized testimony (Pet. 29-38). All of these complaints relate to the investigatory and grand jury phases of the proceedings below.

Petitioners' claims are not presently ripe for review by this Court. On remand the government must discharge its "heavy burden" of establishing that all its grand jury proof and all its trial proof not previously examined was produced from sources wholly independent of petitioners' immunized testimony. *Kastigar* v. *United States*, 406 U.S. 441, 461-462 (1972). As yet there has been no determination of taint regarding the government's evidence presented to the grand jury. Thus, at a future hearing, the district court may determine that some or all of the government's evidence was tainted and, accordingly, may dismiss the indictment or order a new trial. On the other hand, if the court finds that the government has satisfactorily shown that all of its evidence was derived from a source wholly independent of petitioners' immunized testimony — as the courts have already done with respect to ten categories of trial evidence[2] — then petitioners may seek review of that determination in an appeal after remand. It is obviously premature, however, for this Court to address petitioners' complaints regarding the grand jury proceedings until after

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[2]As to the ten specific categories of trial evidence, the government affirmatively demonstrated that knowledge of each item was derived from a source before and independent of the hearing at which petitioners gave immunized testimony (Pet. App. 24B-26B n.2). Petitioner does not challenge the concurrent factual determinations of the courts below that such sources existed, and thus his hypothetical independent source argument has no conceivable application with respect to this untainted evidence.

the remand hearing on that issue mandated by the court of appeals.[3]

Petitioner's complaints about the district court's references to a speculative independent basis for certain evidence and the possibility that government agents examined immunized testimony were not addressed by the court of appeals. Both of the district court's references were made in the context of the grand jury proceedings that will be subject to examination on remand (Pet. App. 2A-3A). On remand, the district court will have to determine whether the government made any use of their immunized testimony. Mere access to that testimony is not sufficient to establish taint. *United States* v. *Pantone*, 634 F.2d 716, 719-722 (3d Cir. 1980); *In re Grand Jury*, 524 F.2d 209, 219 (10th Cir. 1975), cert. denied, 425 U.S. 927 (1976). Compare *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973) (taint found when prosecutor read three volumes of defendant's immunized testimony prior to seeking indictment). These factbound questions should be decided in the first instance by the district court. Should that court rule against petitioners, they will be free to litigate that determination through post-remand appellate review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

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[3]We note in this connection our disagreement with the holding of the court of appeals that dismissal of the indictment would be a proper remedy upon a showing that petitioners' immunized testimony had been directly or indirectly used before the grand jury. See *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966).